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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Titles and texts of draft articles on the International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law adopted by the Drafting Committee at its forty-seventh session

International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law

Article A [6]

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It must be compatible with any specific legal obligations owed to other States with respect to transboundary harm and with the general obligation with respect to preventing or minimizing the risk of causing significant transboundary harm.

Article B [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm, and if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

Article C [8 and 9]

Prevention

States shall take all reasonable measures or action necessary to prevent or minimize the risk of significant transboundary harm.

Article D [9 and 10]

Liability and compensation

Subject to the present articles, there is liability for significant transboundary harm caused by an activity referred to in article 1. Such liability shall be met by compensation, financial or otherwise, in accordance with the present articles.

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Forty-seventh session
2 May - 21 July 1995

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

Rapporteur: Mr. Francisco Villagran Kramer

CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

CONTENTS

		Paragraphs	Page
A.	Introduction	1 - 10	2
B.	Consideration of the topic at the present session	11 - 117	5
1.	Presentation by the Special Rapporteur of his thirteenth report	15 - 16	6
2.	Summary of the debate on the Special Rapporteur's thirteenth report	17 - 99	7
(a)	General remarks	17 - 20	7
(b)	Observations concerning Part I of the draft	21 - 24	9
(c)	Observations concerning Part II of the draft	25 - 95	11
(d)	The question of penalties	96 - 99	44
3.	Summing up of the debate by the Special Rapporteur	100 - 113	46
4.	Action taken by the Commission at the current session	114 - 117	48

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CHAPTER II

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

1. The General Assembly, in resolution 177 (II) of 21 November 1947, directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft Code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

2. On the basis of the reports of the Special Rapporteur, the Commission: (a) at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session, in 1954, submitted a draft Code of offences against the peace and security of mankind, with commentaries, to the General Assembly. 1/

3. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of offences against the peace and security of mankind as formulated by the Commission raised problems closely related to those of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

4. On the basis of the recommendations of the Special Committee, the General Assembly, in resolution 3314 (XXIX) of 14 December 1974, adopted the Definition of Aggression by consensus.

5. On 10 December 1981, the General Assembly, in resolution 36/106, invited the Commission to resume its work with a view to elaborating the draft Code of offences against the peace and security of mankind and to examine it with the

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1/ Yearbook ... 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. 2/

6. The Commission, at its thirty-fourth session, in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. 3/ The Commission, from its thirty-fifth session, in 1983, to its forty-third session, in 1991, received nine reports from the Special Rapporteur. 4/

7. At its forty-third session, in 1991, the Commission, provisionally adopted on first reading the draft articles of the draft Code of Crimes against the Peace and Security of Mankind. 5/ At the same session, the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for their comments and observations, with a request that such comments and observations be submitted to the Secretary-General by 1 January 1993. 6/ The Commission noted: that the draft it had completed on first reading constituted the first part of the Commission's work on the topic of the draft Code of Crimes against the Peace and Security of Mankind; and that the Commission would continue at forthcoming sessions to fulfil the mandate the General Assembly had assigned to it in paragraph 3 of resolution 45/41, of

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2/ In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read "Draft Code of Crimes against the Peace and Security of Mankind".

3/ For a detailed discussion of the historical background of this topic, see the Report of the International Law Commission on the work of its thirty-fifth session (Official Records of the General Assembly, Thirty-eighth session, Supplement No. 10, (A/38/10)), paras. 26 to 41.

4/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), document A/CN.4/387; Yearbook ... 1986, vol. II, document A/CN.4/398; Yearbook ... 1987, vol. II (Part One), document A/CN.4/404; Yearbook ... 1988, vol. II (Part One), document A/CN.4/411; Yearbook ... 1989, vol. II (Part One), document A/CN.4/419 and Add.1 and Corr.1 and 2 (Spanish only); Yearbook ... 1990, vol. II (Part One), document A/CN.4/430 and Add.1; Yearbook ... 1991, vol. II (Part One), document A/CN.4/435 and Add.1 and Corr.1.

5/ See Yearbook ... 1991, vol. II (Part Two), para. 173.

6/ Ibid., para. 174.

28 November 1990, which invited the Commission, in its work on the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. 7/

8. At its forty-sixth session, the General Assembly in its resolution 46/54 of 9 December 1991 invited the Commission, within the framework of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in the Commission's report on the work of its forty-third session (1991) 8/ concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism, in order to enable the General Assembly to provide guidance on the matter.

9. At its forty-fourth and forty-fifth sessions, in 1992 and 1993, the Commission had before it the Special Rapporteur's tenth and eleventh reports on the topic (A/CN.4/442 and A/CN.4/449 and Corr.1 (English only)), which were entirely devoted to the question of the possible establishment of an international criminal jurisdiction. The work carried out by the Commission at its forty-fourth (1992), forty-fifth (1993) and forty-sixth (1994) sessions on that question culminated in the adoption, at the forty-sixth session in 1994, of a draft statute of an international criminal court which the Commission submitted to the General Assembly with the recommendation that it convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court 9/

10. At its forty-sixth session in 1994, the Commission had before it the Special Rapporteur's twelfth report on the topic (A/CN.4/460 and Corr.1), which was intended for the second reading of the draft Code and focused on the

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7/ Ibid., para. 175. The Commission noted that it had already started to discharge this mandate and its work on this aspect of the topic was reflected in paras. 106 to 165 of its report (ibid.).

8/ Yearbook ... 1990, vol. II (Part Two) (A/45/10), chap. II, sect. C.

9/ See Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II A.

general part of the draft dealing with the definition of crimes against the peace and security of mankind, characterization and general principles. It also had before it, in document A/CN.4/448 and Add.1, the comments and observations of Member States, submitted in response to the request made by the Commission at its forty-third session, on the draft Code of Crimes against the Peace and Security of Mankind, as adopted on first reading at that session. 10/ After considering the twelfth report, the Commission decided to refer draft articles 1 to 15, as dealt with in that report, to the Drafting Committee.

B. Consideration of the topic at the present session

11. At the present session, the Commission had before it the thirteenth report of the Special Rapporteur on the topic (A/CN.4/466 and Corr.1 (English and Russian only)). This report was prepared for the second reading of the draft Code and focused on the crimes against the peace and security of mankind contained in Part II. 11/

12. The Special Rapporteur had indicated in his twelfth report the intention to limit the list of crimes to be considered during the second reading of the Code to offences whose characterization as crimes against the peace and security of mankind was hard to challenge. 12/ Accordingly, the Special Rapporteur had omitted from his thirteenth report 6 of the 12 crimes included on first reading, namely, the threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), apartheid (art. 20), the recruitment, use, financing and training of mercenaries (art. 23), and wilful and severe damage to the environment (art. 26), in response to the strong opposition, criticisms or reservations of several Governments with respect to those crimes.

10/ Yearbook ... 1991, vol. II (Part Two), chap. IV.

11/ Part II, as adopted on first reading, included the following 12 2crimes: aggression (art. 15), threat of aggression (art. 16), intervention (art. 17), colonial domination and other forms of alien domination (art. 18), genocide (art. 19), apartheid (art. 20), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), recruitment, use, financing and training of mercenaries (art. 23), international terrorism (art. 24), illicit traffic in narcotic drugs (art. 25), and wilful and severe damage to the environment (art. 26).

12/ A/CN.4/460, para. 3.

13. In his thirteenth report, the Special Rapporteur reproduced the draft articles adopted on first reading containing the definitions of the remaining six crimes against the peace and security of mankind comprising Part II, namely, aggression (art. 15), genocide (art. 19), systematic or mass violations of human rights (art. 21), exceptionally serious war crimes (art. 22), international terrorism (art. 24) and illicit traffic in narcotic drugs (art. 25). Each article was followed by comments from Governments and then by the Special Rapporteur's views and recommendations.

14. The Commission considered the Special Rapporteur's thirteenth report at its 2379th to 2386th ... meetings held from 3 May to ... 1995.

1. Presentation by the Special Rapporteur of his thirteenth report

15. Introducing his thirteenth report, the Special Rapporteur indicated that, since the Commission was working on its second reading of the draft articles, he did not intend to launch a theoretical discussion. His remarks would focus on two types of proposed changes: first, on the content ratione materiae of the draft articles; and, second, on more specific changes in either the substance or the form of the articles. Recalling the long-standing divergence of opinions within the Commission between the maximalist trend, favouring incorporation of a great number of offences, and the minimalist trend, favouring the narrowest possible scope of the Code, he had tried to restrict the content ratione materiae of the draft Code, perhaps provisionally, to six crimes whose designation as crimes against the peace and security of mankind could hardly be disputed. His decision to abandon some of the offences originally included had been motivated by the reservations, and even opposition, expressed by the Governments that had transmitted their comments on the draft Code as adopted on first reading, although noting that third world countries had generally not expressed their views.

16. Turning to more specific changes, the Special Rapporteur proposed a revised definition of aggression (art. 15) since the original wording, based on the definition of aggression contained in General Assembly resolution 3314 (XXXIX), was viewed as too political and lacking the necessary legal precision and rigour. While noting suggested changes regarding genocide (art. 19), he preferred not to depart from the widely accepted Convention on the Prevention and Punishment of the Crime of Genocide. As regards "systematic or mass violations of human rights" (art. 21), he proposed reverting to the earlier title "Crimes against humanity" which was supported

by the relevant doctrine and case law, corresponded to an expression used both in international law and in domestic law, and deleted the somewhat controversial "massive in nature" requirement, thereby recognizing the possibility of a crime against humanity perpetrated against a single victim based on the perpetrator's motives and its cruelty. Regarding war crimes (art. 22), he noted that the proposed non-exhaustive definition was drawn from the statute of the ad hoc tribunal for the former Yugoslavia. As regards international terrorism (art. 24), he felt that the Code should contain a general definition notwithstanding the difficulty of reaching consensus on such a definition or the elaboration of specific treaties in this area. With regard to illicit drug trafficking (art. 25), he emphasized its harmful effects on the health and well-being of mankind, its destabilizing effect on some countries and its interference with harmonious international relations.

2. Summary of the debate on the Special Rapporteur's thirteenth report

(a) General remarks

17. A number of members praised the Special Rapporteur's thirteenth report for its political wisdom, realism and pragmatism in taking into account the views of Governments in an effort to ensure the widest possible acceptance of the draft Code. Appreciation was also expressed to the Special Rapporteur for the concision, the precision, the clarity and the timeliness of his thirteenth report.

18. There were different views concerning the restrictive approach to the list of crimes reflected in the thirteenth report in which this list had been reduced from 12 to 6 crimes. While some members favoured retaining only the most serious crimes with the gravest consequences, the "crimes of crimes", which were difficult to challenge as crimes against the peace and security of mankind, other members felt that the reductions were too drastic and relied too heavily on the views expressed by a limited number of Governments. Several members expressed regret that relatively few Governments had communicated their comments on the draft Code, which could not be regarded as representative of the international community, with different views being expressed as to the conclusions to be drawn therefrom. It was suggested that some guidance might also be obtained from the views expressed by Governments on the related subject of the draft statute for an international criminal court completed by the Commission at its previous session. While recognizing

the role of Governments in the formulation of international law, attention was also drawn to the role of the Commission as an expert body of independent jurists in the progressive development and codification of international law.

19. As regards the topic in general, some members emphasized its continuing relevance in the light of the serious crimes being committed in various parts of the world, often with impunity; the importance of formulating a sufficiently precise code of international criminal law that could be applied uniformly by an international criminal court, in contrast to ad hoc tribunals, in accordance with the maxim nullum crimen, nulla poena sine lege; and the "creeping jurisdiction" of national courts resulting from the present gap in the international legal system. The view was also expressed that the Commission's completion of the Code, a project begun in the early days of the United Nations, during the present quinquennium would constitute a substantial contribution to the United Nations Decade of International Law and a fitting tribute to the fiftieth anniversary of the United Nations. However, other members drew attention to the sensitive aspects of the topic in terms of the relations between States as well as the role of the Security Council and the General Assembly under the Charter of the United Nations in relation to an international criminal court. It was suggested that it was not for the Commission to determine definitively whether the Code was still useful and necessary in the light of recent events, whether the Code implied an international criminal court, or whether its application by national jurisdictions would be conducive to peace, security and justice.

20. As to the nature and purpose of the Code, there were different views as to whether it should take the form of a draft convention, a declaration or model principles enabling action by States in the absence of a detailed international criminal code or a permanent international criminal court. While the view was expressed that a general code of crimes in the form of a declaration could provide useful guidelines to the various organs of the international community, including States, the view was also expressed that a meaningful Code should take the form of a convention containing sufficiently precise provisions based on existing law to ensure its effective application in the prosecution of individuals. In this regard, it was suggested that the Commission should ensure the necessary coordination and harmonization of the Code and the draft statute for an international criminal court.

(b) Observations concerning Part I of the draft

Article 1. Definition 13/

21. There were different views as to the usefulness of including a general conceptual definition of the crimes contained in the Code. Some members favoured such a definition to specify the nature of the crimes to be envisaged in the Code, to provide a common denominator for determining the inclusion of crimes, to provide a point of reference for the application of the Code by courts, and to ensure the necessary harmonization of national and international criminal law, particularly if the provision were amended to refer to "general principles of law". However, other members questioned the possibility of achieving a comprehensive conceptual definition comprising the essential objective components of the crimes and expressed concern regarding the risk of misinterpretation of such a definition. It was suggested that it might be more useful to identify the inherent characteristics of crimes against the peace and security of mankind, such as seriousness, massiveness and effects on the foundations of the international legal order, to provide objective criteria in determining the crimes to be included in the Code and to facilitate its application by any court.

13/ Draft article 1 provisionally adopted by the Commission on first reading reads as follows:

Article 1

Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization 14/

22. The view was expressed that it was important to avoid any misconception regarding the characterization of a crime which would be the exclusive concern of the judge in applying the Code. The view was also expressed that the first sentence of this provision was too strong, and perhaps incorrect, and should be omitted.

Article 3. Responsibility and Punishment 15/

23. There were different views as to whether the principles of individual criminal responsibility should be addressed in general terms in the present article, in specific terms in relation to the definition of each of the crimes contained in Part II, or possibly in both sections of the Code. The view was expressed that the present article should include a reference to intent since

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14/ Draft article 2, provisionally adopted by the Commission on first reading reads as follows:

Article 2

Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

15/ Draft article 3 provisionally adopted by the Commission on first reading reads as follows:

Article 3

Responsibility and punishment

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.

2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.

3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind [as set out in articles ...] is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

there seemed to be general agreement on the necessity of mens rea as an element of a crime and disagreement only as to whether this element was already implicit in the nature of the acts covered by the Code. The rules relating to complicity were described as being of greater significance to national criminal legislation than the Code which should focus on the punishment of the perpetrators of crimes against the peace and security of mankind.

Article 5. Responsibility of States 16/

24. The view was expressed that the provision should be retained given the importance of ensuring the international liability of a State for damage caused by its agents as a result of their criminal acts. Attention was also drawn to article IX of the Genocide Convention as presently providing the only legal basis for bringing action against States who were allegedly responsible for genocide.

(c) Observations concerning Part II of the draft

25. There was a suggestion to amend the title of Part II to read "Crimes against universal peace and humanity."

26. As regards the nature of the definitions of the crimes, several members emphasized the importance of formulating definitions with the necessary precision and rigour required for criminal law in accordance with the nullum crimen sine lege principle, with a further suggestion to avoid an excessively rigid or flexible interpretation of this principle. However, the view was also expressed that it would be preferable to dispense with any such definitions since the statutes of existing or future international jurisdictions would necessarily contain their own definitions of the crimes to be punished and the penalties to be imposed.

27. Attention was drawn to the need to give further consideration to the differences in the definitions of the various crimes in terms of the

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16/ Draft article 5 provisionally adopted by the Commission on first reading reads as follows:

Article 5

Responsibility of States

Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

individuals responsible therefor, for example leaders or organizers in the case of aggression, and the ways in which such individuals could incur criminal responsibility for particular crimes, such as by means of incitement in the case of genocide. In this regard, the view was expressed that the definitions of the crimes contained in Part II should only refer to the principal author of a crime and leave the question of the responsibility and punishment of persons who planned or ordered the commission of a crime, as an accessory before the fact, to be addressed in the general principles contained in article 3.

28. Regarding the reference to penalties, the view was expressed that it was unnecessary to repeat, for each crime, that "on conviction thereof" an individual would be sentenced to punishment since the imposition of a sentence clearly implied that an individual had been found guilty of a crime. Some members suggested that it would be preferable to address the question of penalties in a general provision rather than in the definition of each crime, as discussed in paragraphs ... below.

29. As to the list of crimes to be included in Part II, some members favoured the minimalist approach adopted by the Special Rapporteur to ensure a meaningful Code strictly confined to the most serious crimes that posed a serious and immediate threat to the peace and security of the whole of mankind, as recognized by the international community; to give priority to the crimes whose prosecution was provided for by well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument; to exclude crimes on which there was insufficient existing practice or which were mainly of historical significance; to ensure the widest possible acceptance of the Code; to avoid undermining the success of the entire Code by engaging in a quixotic exercise resulting in yet another draft that would remain in the archives. There was a further suggestion to restrict the Code to crimes whose perpetrators were directly responsible by virtue of existing general international law, and primarily the international crimes of States for which individual criminal responsibility was only one of the consequences thereof. However, other members favoured a maximalist approach to provide a comprehensive code; to strengthen international law as well as international peace and security; to protect the fundamental interests of the international community in preserving life, human dignity and property rights; and to achieve a more appropriate

balance between political realism and legal idealism. Those who favoured the latter approach also suggested that the former approach was no guarantee of acceptance of the draft by States, nor of consensus on its contents.

30. There was broad agreement on the usefulness of achieving generally agreed, objective, relevant criteria for determining not only serious international crimes, but those which qualified as crimes against the peace and security of mankind and should therefore be included in the Code. In this regard, several members referred to the criteria used by the Special Rapporteur in determining the reduced list of crimes, namely the extreme seriousness of the crimes and the general agreement of the international community regarding their character as a crime against the peace and security of mankind. The second criterion was described as an appropriate attempt to take into account the views of the "international community as a whole" which was considered to be theoretically justified because of its consistency with the closely related notions of jus cogens and of international State crimes. However, this criterion was also questioned as being inconsistent with the role of the Commission in submitting its legal assessment of doctrine and State practice for subsequent review by States.

31. There were various suggestions concerning other relevant criteria that might be considered by the Commission in determining the list of crimes, including: acts committed by individuals which posed a serious and immediate threat to the peace and security of mankind, drawing upon the general definition contained in article 1; the highest threshold of gravity and the public interest; the gravity of the act itself, its consequences or both and the designation of the act as a crime by the international community as a whole, notwithstanding an element of ambiguity in the notion of consensus reflected in the second criterion; and the effect of the crime on the international community as a whole. It was also suggested that the crimes referred to in the draft statute for an international criminal court and the criteria used to determine those crimes might provide some useful guidance. In this regard, it was further suggested that it would be useful to establish a special mechanism to ensure the harmonization of the provisions of the draft Code and the draft Statute with a view to achieving a more coherent and integrated structure.

32. There were different views as to the possibility and the desirability of using appropriate criteria to determine an exhaustive list of crimes against the peace and security of mankind and whether it should be possible to use the

same criteria to add to this list, possibly by way of amendment, as a consequence of the necessary consensus existing at a latter stage.

33. Some concerns were expressed by members favouring the maximalist approach as well as those favouring the minimalist approach to the Code regarding the effect of excluding specific acts from the list of unquestionable crimes against the peace and security of mankind adopted on first reading. There were various suggestions for addressing these concerns, including: indicating that the exclusion of the crimes was not intended to minimize the serious nature or the consequences of those crimes or to undermine existing practice and doctrine with respect to those crimes, and recognizing the historical importance and the numerous victims of crimes such as colonial domination and apartheid.

Article 15. Aggression 17/

34. The debate indicated broad agreement both as to the character of aggression as the quintessential crime against the peace and security of mankind and as to the difficulties of elaborating a sufficiently precise

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17/ Draft article 15 provisionally adopted by the Commission on first reading reads as follows:

Article 15

Aggression

1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced [to ...].

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however

definition of aggression for purposes of individual criminal responsibility. While several members noted the significance of the definition of aggression adopted by the General Assembly in resolution 3314 (XXIX), which had resulted

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temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

in the resumption of the Commission's work on the Code, other members emphasized the political nature of this definition which was intended as a guide for the Security Council in the performance of its responsibilities under the Charter of the United Nations and not as a criminal statute to be applied by a court in determining individual criminal responsibility. The question was raised as to whether the Security Council had ever relied on the resolution in performing its functions.

35. The definition of aggression adopted on first reading, which was drawn from General Assembly resolution 3314 (XXIX), was viewed as unsatisfactory by a number of members who felt that it was too political and too vague for purposes of determining individual criminal responsibility. However, other members felt that the definition, which represented a minimum of agreement, could be adapted for the purposes of the Code, noting in particular the listing of cases of aggression containing specific factual elements that could be incorporated in a definition of the crime. In this regard, attention was also drawn to a 1975 protocol amending the Treaty of Rio adopted by the Organization of American States which had been influenced by resolution 3314 (XXIX) and contained an article listing the constituent elements of aggression.

36. As regards paragraph 1 of the new text proposed by the Special Rapporteur, 18/ it was suggested that the language contained in this provision should be used in paragraph 1 of articles 21, 22, 24 and 25 as well.

18/ The new text of draft article 15, proposed by the Special Rapporteur reads as follows:

Article 15

Aggression

1. An individual who as leader or organizer is convicted of having planned or ordered the commission of an act of aggression shall be sentenced to ...

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

The view was also expressed that the scope of criminal liability with respect to a "leader or organizer" was too narrow and should be expanded to include other decision makers in the national hierarchy with sufficient authority and power to initiate conduct constituting a crime of aggression.

37. The reference to "an act of aggression" in the same paragraph elicited different views concerning the importance of distinguishing between acts of aggression and wars of aggression, with attention being drawn to the differentiation between the two in the General Assembly resolution concerning aggression. Some members felt that the notion of a war of aggression indicated the level of magnitude required for the conduct to result in individual criminal responsibility, noting the use of the term in the Charter of the Nürnberg Tribunal and the Nürnberg Principles. A suggestion was made to reformulate the provision to read "For the purposes of the present Code, the massive use of armed force by a State against the sovereignty, territorial integrity or political independence of another State is deemed to constitute a war of aggression." However, other members rejected this distinction as artificial or spurious for the following reasons: the concept of war was a relative concept; wars of aggression inevitably included acts of aggression; the distinction between the seriousness and the legal consequences of the two was misleading and unsustainable in practice; the relevant criterion for purposes of the Code was whether the consequences of acts of aggression or wars of aggression were of sufficient gravity or magnitude to threaten the peace and security of mankind; the emphasis on wars of aggression was misplaced since declarations of war no longer existed in international relations; the term "war of aggression", which was used in the Charter of the Nürnberg Tribunal, was an anachronistic reference to the Kellogg-Briand Pact; and acts of aggression, such as invasion or annexation of territory, were sufficiently serious to constitute crimes under the Code.

38. With regard to paragraph 2, the view was expressed that the present article was too broad and too vague in relying on the principle of the non-use of force embodied in Article 2, paragraph 4 of the Charter which was a basic principle intended to regulate inter-State relations rather than to define the crime of aggression. Other members also expressed the view that the Charter provision covered a wide range of situations some of which were not sufficiently serious to constitute aggression, much less an international crime, referring to such examples as the preemptive use of force in

self-defence, the rescue of hostages, and humanitarian intervention to put an end to genocide. The aim of the Commission, it was suggested, should be to identify the "hard core" of particularly heinous and serious acts for which individuals should be punishable by the international community and not to define the acts that constituted "aggression" in relations between States. There was also a suggestion to define aggression by reference to general international law, without further qualification, or else to qualify the reference to "armed force" in the new proposed paragraph 2 with wording such as "of a level of seriousness which constitutes an act of aggression under international law". Other members expressed the view that an act of aggression necessarily included an element of massive scale and that the term "use of armed force" implicitly contained the element of an organized attack for purposes of the definition of aggression.

39. The view was expressed that references to "sovereignty", "political independence" or "any other manner inconsistent with the Charter of the United Nations" had political connotations and should be replaced by a formulation referring more directly to the victim State, for example, "use of armed force against another State". The use of the term "sovereignty" was also questioned as lacking the necessary precision for criminal law and as not having any meaning apart from the territorial integrity or political independence of a State in the present context. While some members described the phrase "or in any other manner inconsistent with the Charter of the United Nations" as too vague or ambiguous for purposes of criminal law, others viewed the phrase as essential to avoid reducing the scope of the concept of aggression in the Code, as compared to the State responsibility topic; undermining the rule of law by allowing a wider margin for the use of force; and reducing the area of individual criminal responsibility contrary to the narrowly construed exceptions to the general prohibition of the use of force.

40. Regarding paragraph 3, the view was expressed that it did not add anything of substance and could be deleted. However, there was also a suggestion to incorporate the gravity criterion in the present paragraph by reformulating it to read "The first use of armed force by a State in contravention of the Charter shall constitute <u>prima facie</u> evidence of an act of aggression, evidence which is rebuttable in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity".

41. As regards paragraph 4, it was suggested that the list of specific acts constituting aggression, regardless of a declaration of war, had some merit and should receive due attention. However, the view was also expressed that the provision did not add anything of substance and could be deleted.

42. Regarding paragraph 4 (h), the reference to the determination of an act of aggression by the Security Council elicited different views concerning the role of the Security Council and the effect of such a determination with respect to the definition of the crime of aggression and the determination of individual criminal responsibility. Several members emphasized the importance of clearly distinguishing between the functions of the Security Council and those of a judicial body, with references being made to the notion of separation of powers and the principle of the independence of the judiciary. In this regard, some members felt that the role of the Security Council envisaged in the draft Code and in the draft Statute had been exaggerated since the action by the Security Council would not adversely affect the independence of the court in assessing the criminal responsibility of particular individuals. The Security Council action with respect to a State envisaged in the draft statute of the court was described as relating only to the procedures or modalities for instituting judicial proceedings in contrast to the substantive law defining the crime and the role of the court in determining the criminal responsibility of particular individuals. Emphasis was placed on the distinction between the sanctions imposed on States by the Security Council and the criminal penalties imposed on individuals by a court.

43. Other members expressed serious concerns that the Permanent Members of the Security Council could prevent a prior determination of an act of aggression by the use of the veto and thereby preclude the prosecution of the persons responsible for aggression resulting in their impunity contrary to elementary considerations of justice, including the principles of universality, objectivity, impartiality and the equality of all before the law. The view was expressed that the failure of the Security Council to determine an act of aggression in a specific case would not prevent other organs of the international community from exercising their own powers, subject to certain provisions such as Article 12 of the Charter. Attention was drawn to the "Uniting for peace" resolution (General Assembly resolution 377 (V)) as possibly providing some useful guidance in this respect. In suggesting the deletion of paragraph 4 (h), the view was

expressed that while the Commission should not call into question the provisions of the Charter or the role of the Security Council, the Charter did not say that a Security Council determination was binding on a domestic or international court and the intervention of the Security Council in the functioning of national or international criminal jurisdictions was unnecessary. In this regard, attention was drawn to the possibility of cases in which a court would find the accused not guilty, even though the Security Council had made a determination of aggression. It was further suggested that although the Charter took precedence over other treaties, the decisions of the Security Council did not prevail over international law and treaties, and that the Commission, which was not competent to amend the Charter, should concern itself with the law to be applied by the courts.

44. Some members found it difficult to envisage the trial of an individual for the crime of aggression in the absence of a prior determination by the Security Council of the existence of aggression within the present international legal framework established by the Charter of the United Nations. Without suggesting that this was an ideal solution, the view was expressed that it would be inconceivable for a national court to decide that a State, for it amounted to a State even if an individual was being tried, had committed a crime of aggression by using armed force against another State. It was further suggested that the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court and that a Security Council determination would alleviate the definitional problem of what acts should be classified as crimes of aggression.

45. Regarding paragraphs 5 and 6, some members felt that these provisions were political in nature, did not add anything of substance and could be deleted.

46. As regards paragraph 7, while there was a suggestion to retain it as a valuable saving clause, there were also suggestions to delete it as too political in nature and thereby streamline the legal content of the definition.

47. With reference to the Special Rapporteur's proposal to limit the definition to the first two paragraphs, some members felt that this definition was too general for purposes of criminal law and had political connotations. It was suggested that a general definition accompanied by a non-exhaustive enumeration would provide a more flexible approach, had proved its

applicability in the Charter of the Nürnberg Tribunal, was consistent with the practice followed in the international conventions that defined international crimes, and would allow the law to continue to evolve.

Article 16. Threat of aggression 19/

48. Several members endorsed the Special Rapporteur's proposal to delete the crime of the threat of aggression because of the nebulous character of the underlying concept and the lack of rigour required by criminal law. However, the view was also expressed that the threat of aggression should be retained in the Code.

Article 17. Intervention 20/

49. There was general agreement as to the importance of non-intervention as a fundamental principle of contemporary international law recognized in various

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19/ Draft article 16 provisionally adopted by the Commission on first reading reads as follows:

Article 16

Threat of aggression

1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to ...].

2. Threat of aggression consists of declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State.

20/ Draft article 17 provisionally adopted by the Commission on first reading reads as follows:

Article 17

Intervention

1. An individual who as leader or organizer commits or orders the commission of an act of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to ...].

2. Intervention in the internal or external affairs of a State consists of fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.

international instruments; General Assembly resolutions, including resolution 2131 (XX) on the inadmissibility of intervention in the domestic affairs of States and resolution 2625 (XXV) on principles of international law concerning friendly relations and cooperation among States; and in the jurisprudence of the International Court of Justice, particularly in the Corfu Channel case 21/ and the Nicaragua case. 22/ However, the view was also expressed that the principle was of limited scope, owing in particular to the decline in the number of situations qualifying as internal affairs and to the emergence of situations, affecting human rights in particular, in which the internal jurisdiction exception was unwarranted.

50. Some members favoured the Special Rapporteur's proposed deletion of article 17 because of the nebulous character of the underlying concept and the lack of rigour required by criminal law. However, other members who supported its retention expressed the view that blatant acts of intervention were still a contemporary fact of life, often with the express or thinly disguised aim of destabilizing States in complete disregard of the massive suffering of the populations of the targeted States, and that concerns regarding the lack of precision required by criminal law missed the point that there had been hardly any other acts in the history of mankind which had caused so much misery to millions of underprivileged people and which were almost universally acknowledged to be crimes. There were various suggestions to incorporate some elements of the deleted text in other articles, such as those relating to aggression and terrorism. Attention was also drawn to the classification of intervention as a wrongful act entailing the international responsibility of States which would not be affected by the deletion of the present article.

21/ Corfu Channel (Merits, Judgement), I.C.J. Reports 1949, p. 4.

22/ Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), I.C.J. Reports 1986, p. 14.

Article 18. Colonial domination and other forms of alien domination 23/

51. Some members, while recognizing colonial domination and other forms of alien domination as abhorrent, favoured the Special Rapporteur's proposed deletion of the present article based on the virtual extinction of colonialism, the lack of a precise definition required for criminal law, and the unlikelihood of its acceptance in the Code. However, other members felt that colonial domination and foreign occupation were not a thing of the past; that there were still cases of the denial of the right to self-determination by the use of force; that the glaring disparity between the political and economic situation of the States of the North and that of the States of the South precluded any premature optimism as to the final disappearance of all forms of colonial or neo-colonial domination; that concerns regarding the necessary precision required by criminal law disregarded the historical significance of this crime in terms of human suffering; that there was no guarantee that colonial domination was definitely a thing of the past and not something that could resurface at any time; and that its inclusion in the Code would constitute an important symbolic gesture and an important deterrent.

23/ Draft article 18 provisionally adopted by the Commission on first reading reads as follows:

Article 18

Colonial domination and other forms of alien domination

An individual who as leader or organizer establishes or maintains by force or orders the establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced [to ...].

Article 19. Genocide 24/

52. There was general agreement that the crime of genocide should be included in the Code and should be defined on the basis of the widely accepted Convention on the Prevention and Punishment of the Crime of Genocide.

53. Attention was drawn to the importance of the specific intent required for the crime of genocide in contrast to a general criminal intent in terms of the deliberate will to commit the crime or the awareness of the criminal nature of the act (mens rea). It was suggested that the Drafting Committee might consider using a formulation such as "acts committed with the aim of" or "acts manifestly aimed at destroying" to avoid any ambiguity on this important element of the crime.

24/ Draft article 19 provisionally adopted by the Commission on first reading reads as follows:

Article 19

Genocide

1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced [to ...].

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

54. With regard to paragraph 3 of the Special Rapporteur's new proposed text, 25/ there was some question as to the inclusion of the crime of incitement to commit genocide in the Code. There was also a question as to whether the term "direct and public incitement" was intended to refer to an independent crime of "incitement", which would not require the actual commission of genocide, or to "abetment" as an accessory to a principal crime. In this regard, emphasis was placed on the exceptional nature of the independent crime of "incitement" as a consequence of the need to avoid encroaching on freedom of expression. However, attention was also drawn to recent events in Rwanda and the situation developing in Burundi as evidence of the need to include attempt and incitement to commit genocide as punishable offences.

55. As regards paragraph 4, the question was also raised as to whether attempt should be included as a separate element of the definition of the

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25/ The new text of draft article 19 proposed by the Special Rapporteur reads as follows:

Article 19

Genocide

1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced to ...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. An individual convicted of having engaged in direct and public incitement to commit genocide shall be sentenced to ...

4. An individual convicted of an attempt to commit genocide shall be sentenced to ... .

crime of genocide in the present article or whether it should be addressed in general terms in article 3. The designation of all acts constituting a particular crime was described as having the merit of not requiring the court to decide in each case whether or not the concepts set forth in article 3 were applicable. In this regard, attention was drawn to the relevant provisions contained in the Genocide Convention and in the statutes of the ad hoc tribunals established by the Security Council. However, some members suggested that the notion of attempt required further consideration in the context of the draft articles as a whole and that a decision as to the applicability of this notion should be taken with respect to each crime once the definitive list of crimes had been established.

56. The view was expressed that the crime of complicity, which was explicitly referred to in the 1948 Genocide Convention, should be included in the present article. It was suggested that the Commission's decision regarding the punishment of complicity as a crime under the Code, including acts of preparation and planning, would determine its similar decision regarding attempt which consisted of an effort to commit a crime amounting to more than mere preparation or planning.

57. There was a further suggestion that consideration should be given to the relationship between the Code and article IX of the Genocide Convention, which provided for the compulsory jurisdiction of the International Court of Justice in the case of disputes between Contracting Parties.

Article 20. Apartheid 26/

58. Some members endorsed the Special Rapporteur's proposed deletion of the crime of apartheid for various reasons, including: the fortunate disappearance of apartheid in South Africa; the imprecise definition of the

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26/ Draft article 20 provisionally adopted by the Commission on first reading reads as follows:

Article 20

Apartheid

1. An individual who as leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced [to ...].

2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the

crime, even with respect to South Africa; the broad definition of complicity extending to persons far beyond the frontiers of South Africa; as well as the specific territorial scope of the crime of apartheid with respect to South Africa and the absence of sufficient evidence of similar practices in other States.

59. Several members felt that, although apartheid as such had ceased to exist, the problem of "institutionalization of racial discrimination" still persisted in some parts of the world and that consideration should be given to the Special Rapporteur's proposal to include a general provision that would apply to any system of institutionalized racism by whatever name in any State. It was suggested that consideration should be given to including not only racial discrimination, but also economic, political and cultural discrimination as a crime. It was also suggested that the continued existence of situations of institutionalized racial discrimination should be addressed as systematic violations of human rights rather than as a separate crime. At the same time, the view was expressed that purely hypothetical crimes should not be included in the Code.

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purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

(a) denial to a member or members of a racial group of the right to life and liberty of person;

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;

(e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

60. However, other members described the present article as central to the Code and felt that it should be retained to avoid disregarding the lessons of history, minimizing the seriousness of apartheid, and ignoring the many decisions of United Nations organs. The view was expressed that the disappearance of the symptoms of apartheid was no reason for apartheid to be excluded from the Code, which should include acts because they were criminal in nature and not exclude them because they were no longer likely to occur. In this regard, the view was also expressed that practices similar to apartheid were still occurring in various countries and could resurface in others at any time. It was considered desirable to include crimes such as apartheid and colonial domination in a Code conceived as a symbolic instrument which could be used by States to identify certain acts or activities. Attention was also drawn to the existence of separate legal instruments relating to apartheid and racial discrimination as a justification for maintaining the present article.

Article 21. Systematic or mass violations of human rights 27/

61. Particular importance was attributed to the protection of human rights and to ensuring the compatibility of the present article with international

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27/ Draft article 21 provisionally adopted by the Commission on first reading reads as follows:

Article 21

Systematic or mass violations of human rights

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds

in a systematic manner or on a mass scale; or

- deportation of forcible transfer of population

shall, on conviction thereof, be sentenced [to ...].

human rights law, which was described as one of the most significant achievements of the international community. The basic question was said to be identifying the point at which human rights violations, which were essentially matters of domestic concern within the jurisdiction of national courts, became a matter of international concern that came within international jurisdiction. Some members expressed the view that the new proposed text of article 21 28/ was generally acceptable, while recognizing the possibility of drafting improvements.

62. The Special Rapporteur's proposal to replace the present title of article 21 with "Crimes against humanity" was welcomed by some members as a reflection of the original concept of the Code as well as the wording used in

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28/ The new text of draft article 21 proposed by the Special Rapporteur reads as follows:

Article 21

Crimes against humanity

"An individual who, as an agent or a representative of a State or as an individual, commits or orders the commission of a crime against humanity shall, on conviction thereof, be sentenced [to ...].

"A crime against humanity means the systematic commission of any of the following acts:

"- Wilful killing;

"- Torture [i.e. intentionally inflicting on a person pain or acute physical or mental suffering for the purposes of, inter alia, obtaining information or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of committing, intimidating or exerting pressure on him, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination.

This text does not include pain or suffering resulting solely from lawful punishment or inherent in or caused by such punishment.];

"- Reduction to slavery;

"- Persecution;

"- Deportation or forcible transfer of population;

"- All other inhumane acts."

the Charter of the Nürnberg Tribunal, the Nürnberg Principles and in some penal codes. However, other members preferred to retain the previous title to identify the criteria that distinguished the crimes covered by the present article from ordinary crimes, to distinguish systematic or mass violations of human rights from other crimes against humanity such as genocide, and to avoid creating the impression that crimes not mentioned in the present article were not crimes against humanity. Referring to the relevant precedents, the view was also expressed that the content and legal status of the concept of crimes against humanity as a norm of international law were not as clear as in the case of genocide and war crimes. In this regard, a preference was expressed for the definition of crimes against humanity contained in the statute of the ad hoc tribunal for the former Yugoslavia which closely followed the Charter of the Nürnberg Tribunal and applied only in time of war. However, requiring a link between crimes against humanity and other crimes was also described as neither necessary nor desirable.

63. As regards the Special Rapporteur's proposed deletion of the massive criterion in the definition of the present article, the view was expressed that a review of precedents would reveal that the determining factor was not the scale of violations but the existence of systematic persecution of a community or a section of a community. However, several members felt that this criterion was essential to distinguish the crimes covered by the Code from ordinary crimes under national law; that the concepts of "systematic" and "massive" violations were complementary elements of the crimes concerned; that the dual criteria would ensure wider support for the article and its universal applicability; and that the acts enumerated in the article would constitute crimes threatening international peace and security only when committed on a massive scale. Particular importance was attributed to maintaining the two criteria in the absence of a definition of the constituent elements of the crimes covered by the present article to ensure that the Code would apply only to acts of exceptional seriousness and of international concern. The view was expressed that three criteria, namely seriousness, massive nature, and violation of the international legal order, should be considered to

distinguish between crimes against humanity and human rights violations which were subject to the machinery provided for in the relevant international instruments. Two other criteria were also suggested as relevant, namely the commission of a very serious act by a person who enjoyed the protection or authorization of a State and the institutionalization of human rights violations with the support of the State.

64. Regarding the first paragraph of the Special Rapporteur's new proposed text, there were different views as to whether the crimes covered by the present article should be defined with reference to any "individual" or only those who were agents or representatives of States to distinguish these crimes from ordinary crimes.

65. With regard to the crimes enumerated in the second paragraph, there was a suggestion to amend the first subparagraph to read "wilful killing on a mass scale".

66. As regards the second subparagraph, some members considered the definition of torture appearing between square brackets to be useful, while other members questioned whether it was necessary and suggested that its inclusion might upset the balance of the draft article. There was a suggestion to limit the provision to cruel, inhuman or degrading treatment or punishment based on article 7 of the International Covenant on Civil and Political Rights. There was a further suggestion to consider the definition of torture in greater detail in the commentary to the article rather than in the text.

67. The reference to "persecution" in the fourth subparagraph was questioned as vague and overly broad. A preference was expressed for the earlier wording of "persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale". The view was expressed that even this language went beyond the Charter of the Nürnberg Tribunal, which required that such acts be in execution of or in connection with other crimes within its jurisdiction, and the Statute of the International Criminal Tribunal for the former Yugoslavia, which covered such acts only if they were committed in armed conflict.

68. While expressing support for the inclusion of "Deportation or forcible transfer of population" in the fifth subparagraph, some members felt the provision required greater clarity and precision to avoid including transfers of population that would be legally acceptable, for example, for reasons relating to the protection of the population, health considerations or economic development. The view was expressed that the provision should be limited to the deportation or forcible transfer of population on social, political, racial, religious or cultural grounds contrary to the relevant human rights instruments.

69. With regard to "other inhumane acts" covered by the sixth subparagraph, the view was expressed that the idea of providing a general category of such acts should be scrutinized very carefully. While some members felt that the phrase, which appeared in other similar instruments, should be retained, other members thought that it was too vague for the definition of a crime. There was also a suggestion to supplement the words "all other inhumane acts" by the phrase "perpetrated on a mass scale".

70. The view was expressed that forced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world, should be included as serious violations of human rights constituting crimes against the peace and security of mankind. While noting the difficulties involved in defining a crime in which the victims often disappeared without a trace, a proposed definition of enforced disappearances was submitted based on the Inter-American Convention on Forced Disappearance of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly resolution 47/133). Some members expressed their support for including the practice of systematic and forced disappearance of persons in the present article and for considering the proposed definition (A/CN.4/L.505) in the Drafting Committee.

71. As mentioned previously, some members felt that institutionalized racial discrimination should be included in the present article as a consequence of the proposed deletion of article 20 concerning apartheid.

Article 22. Exceptionally serious war crimes 29/

72. Some members welcomed the Special Rapporteur's decision to revert to the traditional notion of war crimes and to abandon the idea of introducing the new concept of "exceptionally serious war crimes" which had given rise to concerns regarding its meaning and its implications for existing international

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29/ Draft article 22 provisionally adopted by the Commission on first reading reads as follows:

Article 22

Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

humanitarian law. 30/ However, there was also some concern about

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30/ The new text of draft article 22 proposed by the Special Rapporteur reads as follows:

Article 22

War crimes

An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [...].

For the purposes of this Code, a war crime means:

1. Grave breaches of the Geneva Conventions of 1949, namely:

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement of a civilian;

(h) Taking civilians as hostages.

2. Violations of the laws or customs of war, which include, but are not limited to:

(a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

abandoning the new concept which had been intended to limit the scope of the present article to very serious violations that would meet the necessary criteria for inclusion in the Code.

73. Some members also endorsed the Special Rapporteur's approach, which closely followed the Statute of the International Criminal Tribunal for the former Yugoslavia, while attention was drawn to some drafting innovations in the present article which might require further consideration. There was also some question about the wisdom of referring to a particular convention without regard to whether the State or States concerned were a party to that convention. In this regard, there was a suggestion to refer to "international humanitarian law" rather than particular conventions.

74. Noting the change in the title of the new article, attention was drawn to the need to make a corresponding change in the opening sentence of the text in the English version.

75. As regards paragraph 1, the view was expressed that it was sufficiently broad for purposes of the Code. However, there were also suggestions to expand the provision to include other international instruments and other violations. With regard to the international instruments, some members felt that Additional Protocol I should be clearly incorporated in the present provision. While noting the inapplicability of the notion of "grave breaches" or "war crimes" to non-international armed conflicts, some members felt that common article 3 of the 1949 Geneva Conventions and Additional Protocol II should also be included in this paragraph, citing the recently adopted Statute of the International Tribunal for Rwanda. However, there was also an indication of opposition to this suggestion. In terms of violations, there were suggestions to add "attacks against civilian populations" and "the establishment of settlers in an occupied territory and changes in the demographic composition of an occupied territory", the latter violation having appeared in the text adopted on first reading on the basis of article 85, paragraph 4 of Additional Protocol I to the 1949 Geneva Conventions.

76. Regarding paragraph 2, a preference was expressed for referring to "serious" violations of the laws or customs of war, a phrase the Commission

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(d) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) Plunder of public or private property.

had already incorporated in the draft Statute for an International Criminal Court. The view was expressed that the recourse to a non-exhaustive list was perhaps the best approach. In this regard, it was suggested that paragraph 2 could be reformulated to clearly indicate that those crimes which were not explicitly listed in the paragraph must be as serious as those which were listed therein, for example, by using the phrase "Such violations of the laws or customs of war as are:". However, some members felt that an exhaustive list would be more consistent with the principle of nullum crimen sine lege and would provide uniformity with respect to the two paragraphs of the present article, while recognizing the difficulty of elaborating such a list.

77. There were different views as to whether paragraphs 1 and 2 should be combined in a single article or appear as separate articles.

Article 23. Recruitment, use, financing and training of mercenaries 31/

78. Several members expressed support for the Special Rapporteur's decision to eliminate the crime of recruitment of mercenaries. Some members felt that

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31/ Draft article 23 provisionally adopted by the Commission on first reading reads as follows:

Article 23

Recruitment, use, financing and training of mercenaries

1. An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- recruitment, use, financing or training of mercenaries for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law

shall, on conviction thereof, be sentenced [to ...].

2. A mercenary is any individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

the acts originally dealt with in article 23 could be prosecuted as crimes linked to aggression, in so far as they involved the participation of agents of the State, or as acts of international terrorism. While noting the limited acceptance of the relevant convention, some concern was expressed regarding the exclusion of the crime from the Code in the light of its historical significance, particularly in parts of Africa, and the ideological aspect of the crime as a means of preserving a model of colonialism.

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any individual who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State in whose territory the act is undertaken.

Article 24. International terrorism 32/

79. There were different views as to whether the crime of international terrorism should be included in the Code. Some members expressed serious doubts as to the possibility of elaborating a general definition with the necessary precision for criminal law. There were also different views as to whether the existing international instruments dealing with specific aspects of the problem would provide the necessary guidance for a general definition. In this regard, a distinction was drawn between the crimes that could be prosecuted based on general international law, including aggression, war crimes, genocide and other crimes against humanity, and the crimes that presupposed the existence of a convention for their prosecution, including international terrorism. The recent adoption by the General Assembly of the Declaration on Measures to Eliminate International Terrorism (General Assembly resolution 49/60) was viewed as having resolved the impenetrable political obstacles but not the technical problems in achieving a general definition of terrorism.

80. There was also some question as to whether every terrorist act would constitute a crime against the peace and security of mankind or otherwise meet the criteria for the inclusion of crimes in the Code. The view was expressed that the exclusion of international terrorism from the Code could be regarded as inconsistent with Security Council resolution 748 (1992), which stipulated that certain acts of terrorism constituted a threat to international peace and security. However, the view was also expressed that the question of the

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32/ Draft article 24 provisionally adopted by the Commission on first reading reads as follows:

Article 24

International terrorism

An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

- undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public

shall, on conviction thereof, be sentenced [to ...].

inclusion of international terrorism in the Code did not affect the ability of the Security Council to take measures in response to a specific situation affecting peace and security throughout the world. The view was further expressed that an international criminal court might provide a political solution to the problem of jurisdiction when acts of terrorism created serious tensions in international relations, but it would not resolve the question of the applicable law. It was suggested that international terrorism might constitute a crime against the peace and security of mankind when the terrorist acts were particularly grave and massive in character and that consideration could be given to its inclusion as a crime against humanity.

81. Those who favoured the inclusion of international terrorism as a separate article in the Code emphasized the seriousness of acts of terrorism, the universal recognition of such acts as crimes, the continuing occurrence of such acts, the need to formulate a general definition to facilitate the prosecution of the perpetrators of all such acts, and the enhanced deterrence to be derived from the characterization of international terrorism as a crime against the peace and security of mankind and its inclusion in the Code. In this regard, the view was expressed that it was necessary to identify the common features of the various forms of terrorism and to provide for the international prosecution of terrorism as a crime under the Code since little progress had been made in eradicating terrorism based on national prosecutions under the existing instruments dealing with specific terrorist acts. Other members also emphasized that the two approaches to the suppression of international terrorism should be viewed as complementary rather than mutually exclusive. In terms of the criteria for crimes against the peace and security of mankind, the view was expressed that international terrorism would qualify as such a crime because it endangered the survival of mankind.

82. General remarks concerning the definition of international terrorism, included the following: the definition should avoid any reference to subjective motives and to the objective of the terrorist act; the crime of terrorism should be defined in terms of its nature and effects and should include acts that were intended to spread or had the effect of spreading terror; the definition of terrorism should cover all of its manifestations by way of enumeration; three objective criteria, namely, seriousness, massive

nature and violation of the international legal order should be used to determine the list of terrorist acts that would qualify as crimes against the peace and security of mankind.

83. As regards the Special Rapporteur's new proposed text, 33/ some members felt that is was a marked improvement over the text adopted on first reading. However, a preference was also expressed for the text of the article adopted on first reading, with the possible addition of the reference to "acts of violence" used in the new text.

84. As regards paragraph 1, there were different views as to whether the perpetrators of international terrorism should include individuals as well as State agents and representatives. While some members welcomed the inclusion of individuals acting as such, others felt that the provision was too broad and required further qualification. In this regard, the view was expressed that the scope of the article should not be expanded to include a lone terrorist acting independently without any affiliation to a terrorist organization or group or any element of organized crime. The view was also expressed that State terrorism must certainly be included as a crime against the peace and security of mankind, but that the exact conditions in which an individual act of terrorism could be regarded as such a crime must be clearly specified, possibly in a separate paragraph.

85. As regards paragraph 2, the word "terror" was described as generally understood and therefore preferable to other expressions. However, there was

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33/ The new text of draft article 24 proposed by the Special Rapporteur reads as follows:

Article 24

International terrorism

1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [to ...].

2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way.

also a suggestion to replace the word "terror" by "serious apprehension" to avoid defining terrorism in tautological terms. It was also suggested that the reference to acts directed against "another State" and the phrase "in order to compel the aforesaid State ..." should receive further consideration.

Article 25. Illicit traffic in narcotic drugs 34/

86. Some members felt that illicit drug trafficking should be included in the Code for the following reasons: illicit drug trafficking was a serious scourge that affected the sovereignty of small States; many small States were unable to prosecute perpetrators of such traffic when carried out on a large scale in their own territory; some States were virtually helpless in the face of illicit drug trafficking; "narco-terrorism" could have a destabilizing effect on some countries, notably those in the Caribbean; the international drug cartels could destroy small States and have a disastrous impact even on

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34/ Draft article 25 provisionally adopted by the Commission on first reading reads as follows:

Article 25

Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission of any of the following acts:

- undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context

shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

the larger States; and illicit drug trafficking endangered the survival of mankind while providing funding for other forms of crime, such as terrorism and subversion.

87. However, other members favouring its exclusion expressed the following views: illicit drug trafficking did not meet the criteria for a crime against the peace and security of mankind; it was unlikely to endanger international peace and security unless it was combined with other crimes; most States were opposed to its characterization as a crime against the peace and security of mankind; the prosecution of illicit traffic in narcotic drugs at the international level presupposed the existence of a convention in contrast to other crimes that could be prosecuted on the basis of general international law; the existing relevant conventions focused on suppression of drug trafficking rather than establishing penalties for it at the international level; the existing legal framework and international cooperation arrangements provided the necessary means and machinery for the suppression of illicit drug trafficking since most cases could be effectively prosecuted in the national courts; and increased international cooperation in law enforcement would be a more effective way to deal with the problem. The view was expressed that further consideration should be given to the relationship between the present article and existing conventions such as the 1988 United Nations Convention, which provided methods for mutual assistance between States in the prosecution of offenders and prevention of money laundering, and on the relationship between the jurisdiction of national legal systems and the proposed international jurisdiction under the Code.

88. As regards the Special Rapporteur's new proposed text, 35/ the view was expressed that it contained primarily drafting changes which could be considered along with the text adopted on first reading.

35/ The new text of draft article 25 proposed by the Special Rapporteur reads as follows:

Article 25

Illicit traffic in narcotic drugs

1. An individual who commits or orders the commission of illicit traffic in narcotic drugs on a large scale or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

2. Illicit traffic in narcotic drugs means undertaking, organizing, facilitating, financing or encouraging any production, manufacture,

89. With regard to paragraph 1, the addition of the words "on a large scale ... or in a transboundary context" to the text was endorsed by some members. There were also suggestions to limit the scope of the provision to the most serious cases of illicit drug trafficking, for example, cases of narco-terrorism that were linked to international terrorism or the activities of insurgent groups, which had a destabilizing effect on certain countries and clearly constituted a crime against the peace and security of mankind. The view was expressed that the basic element to be taken into account was the scale on which such traffic was carried out. The view was also expressed that illicit drug trafficking might constitute a crime against the peace and security of mankind when it was particularly grave and massive in character and that consideration could be given to its inclusion in the Code as a crime against humanity but not as a separate crime.

90. The use of the term "individuals" in the same paragraph elicited different views as to whether the provision should cover any individuals, State agents or representatives, or both.

91. The reference to specific penalties in that paragraph was considered to be appropriate since the present article contained the constituent elements of various crimes comprising illicit drug trafficking, such as money laundering.

92. As regards paragraph 2, the view was expressed that the reference to internal law should be deleted to avoid making the crime more national than international in character.

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extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

3. For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

Article 26. Wilful and severe damage to environment 36/

93. Some members shared the Special Rapporteur's view that damage to the environment should not be included in the Code because it did not meet the criteria for a crime against the peace and security of mankind. The view was also expressed that since the draft Code was not intended to cover all crimes under international law committed by individuals, but only those that might threaten the peace and security of mankind, the exclusion of a crime did not rule out its consideration as a crime under international law.

94. However, other members felt that the article should be retained, with the Drafting Committee taking into account the observations of Governments. In this regard, the view was expressed that wilful and serious damage to the environment was a fact of life not just for the present, but for future generations. The view was also expressed that certain kinds of environmental damage would unquestionably threaten international peace and security, such as the deliberate detonation of nuclear explosives or pollution of entire rivers, and should be characterized as crimes against the peace and security of mankind, while recognizing that it may be necessary to narrow the scope of the present provision to limit it to such situations. Attention was drawn to certain criminal attempts to illicitly dump chemical or radioactive waste that was particularly harmful to the environment in the territory or in the territorial waters of developing countries as evidence that those States were most likely to suffer the adverse effects of a gap in the punishment of that type of crime. Attention was also drawn to the possibility of a terrorist group or organization obtaining the necessary materials, techniques and knowledge required to cause environmental damage equivalent to the destruction of the Second World War. Furthermore, attention was drawn to the inclusion of

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36/ Draft article 26 provisionally adopted by the Commission on first reading reads as follows:

Article 26

Wilful and severe damage to the environment

An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to ...].

wilful and severe damage to the environment in article 19 of Part One of the draft articles on the topic of State responsibility and the need to achieve some unity of purpose in the work produced by the Commission.

95. The view was also expressed that there was no need for a separate article on the subject since damage to the environment, such as wilful nuclear pollution or the poisoning of vital international watercourses, would, if it affected international peace and security, be punishable as an international crime under other rubrics of the Code such as aggression, war crimes and international terrorism. In this regard, attention was drawn to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

(d) The question of penalties

96. As regards penalties, the view was expressed that the Code would be an effective and complete legal instrument only if it included the three elements of crimes, penalties and jurisdiction. Several members noted that Governments, in their comments, had declined to specify penalties for each crime, which demonstrated the need for the Commission to be circumspect in prescribing them; shared the Special Rapporteur's view concerning the difficulty of the exercise; and endorsed his suggestion that a scale of penalties should be established, leaving it up to the courts to determine the applicable penalty in each case. This method, it was noted, had been followed in the statutes of international criminal courts adopted since 1945. In this regard, the statutes of the ad hoc tribunals were suggested as possible models for the provision to be included in the Code. However, there was also a suggestion to consider following the language of the 1948 Genocide Convention by requiring States to provide "effective penalties for persons guilty of" crimes against the peace and security of mankind.

97. The view was expressed that it would be sufficient to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the severity of the penalties corresponding to the seriousness of the crimes and the court being left to exercise its discretion within those limits. It was suggested that in substance the applicable penalties should be established in accordance with the maximum penalties applicable in the State in which the crime had been committed or on the basis of such maximum penalties. However, it was also suggested that it would be impossible to establish rigid maximum and minimum sentences, given the numerous and varied

types of war crimes and crimes against humanity, as compared to authorizing the imposition of exemplary punishments, including life imprisonment, for such serious crimes.

98. Some members emphasized that any provision on penalties should be made consistent with the corresponding provision in the draft Statute for an International Criminal Court. It was suggested that it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case, following article 47 of the draft Statute which precluded the death penalty. Support was expressed for stipulating a maximum penalty of life imprisonment considering the gravity of the crimes encompassed by the Code, subject to the discretion of the court to specify such other terms as the particular circumstances of a case might require. However, questions were raised regarding the legal basis for the absence of the death penalty from more recent instruments, whether that absence denoted significant progress in the human rights field, and the fate of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. In this regard, attention was drawn to the discrepancy between the statutes of the ad hoc tribunals and the national legislation of the former Yugoslavia and of Rwanda.

99. The view was expressed that further consideration should be given not only to including a general provision on penalties, but also to addressing the aggravating or mitigating circumstances to be taken into consideration in determining an appropriate penalty in a particular case under article 14.

3. Summing up of the debate by the Special Rapporteur

100. At the conclusion of the discussion of his thirteenth report, the Special Rapporteur summarized the main ideas that had emerged during the debate and gave his opinion on some of the points raised.

101. With regard to the limited views of Governments reflected in the thirteenth report, the Special Rapporteur also regretted the limited response of Governments - particularly of developing countries - to the draft articles approved on first reading, but noted the impossibility of reflecting non-existent comments in his reports.

102. Regarding the reliance on existing treaties and conventions, the Special Rapporteur said that while members of the Commission had encouraged him to follow this approach from the very start of the drafting exercise, he had

questioned its validity in the belief that progressive development of the law meant going beyond existing legal instruments. He also felt that the draft Code consisted primarily of crimes which constituted violations of jus cogens and, therefore, did not rely unduly on existing treaties.

103. Noting that some members of the Commission viewed the restrictive approach to the list of crimes as excessively prudent and apparently wanted him to advance the development of international law, even where there was no consensus within the Commission itself, he felt that the role of a Special Rapporteur was not to force certain solutions on the Commission, but rather to enable the members to reach agreement by faithfully reflecting the pros and cons of a particular hypothesis.

104. As to the draft articles themselves, he said that a consensus had clearly developed in favour of including at least four of them - those on aggression, genocide, war crimes and crimes against humanity.

105. While agreeing that the definition of aggression needed further refinement, he felt that the role of the Security Council had been overemphasized in that connection since the proposed definition deliberately avoided mentioning the Security Council or General Assembly resolution 3314 (XXIX). He further stated that the demarcation line between the Council's competence to determine whether an act of aggression had been committed and that of any court that applied the Code would emerge gradually, as specific cases were considered, but there was no way the Security Council could take over the functions of a court since it had no authority over individuals.

106. He noted that there was general agreement that the Code should include genocide and war crimes, which had been sufficiently codified in legislative texts.

107. As regards systematic or mass violations of human rights, he said that it was for the Commission to decide whether a single atrocity committed against a sole individual could be so shocking as to constitute an offence against mankind as a whole and, if so, to abandon the massive criterion and to revert to the broader term "crimes against humanity" initially proposed by the Special Rapporteur.

108. With regard to intervention, threat of aggression and recruitment of mercenaries, he felt that there seemed to be ample grounds for deleting the relevant articles since no strong arguments had been advanced in their favour.

As regards intervention, he said that the view of Latin American members who characterized it as a crime against the peace and security of mankind was not widely shared and that it was not necessarily pernicious, with the exception of armed intervention which could qualify as aggression under the draft Code. Regarding the threat of aggression, the Special Rapporteur suggested abandoning the notion in view of the difficulty of producing a suitable definition that would be acceptable to Governments. As to recruitment of mercenaries, he felt that this could be linked to the crime of aggression.

109. Regarding the other four crimes - racial discrimination, colonial domination, international terrorism and illicit traffic in narcotic drugs - he noted that further consideration would be required to determine whether these controversial crimes should be retained.

110. Noting the historical relevance of the term "apartheid", he felt that serious consideration should be given to defining and including in the Code the crime of "institutionalized racial discrimination".

111. Similarly noting the historical relevance of colonial domination, he suggested the Commission could either consider as sufficient its inclusion as an international crime in article 19 of Part One of the draft on the topic of State responsibility or endeavour to draft a better definition for purposes of the Code.

112. If the crime of international terrorism were to be retained, he felt that it would be necessary to draft a more acceptable definition for purposes of prosecution in specific cases.

113. Given the limited support for the inclusion of illicit drug trafficking as a crime against the peace and security of mankind, he felt that pending the formulation of a generally acceptable definition, the question had to be kept in abeyance.

4. Action taken by the Commission at the current session

114. The Commission decided at its 2387th meeting to refer to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee would bear in mind and at its discretion deal with all or part of the

elements of the following draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism). The Commission further decided that consultations would continue as regards articles 25 (Illicit traffic in narcotic drugs) and 26 (Wilful and severe damage to the environment).

115. As regards the latter article, the Commission decided at its 2404th meeting to establish a working group that would meet at the beginning of the forty-eighth session to examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment, while reaffirming the Commission's intention to complete the second reading of the draft Code at that session in any event.

116. At the 2408th meeting of the Commission, the titles and texts of articles adopted on second reading by the Drafting Committee (A/CN.4/L.506 and Corr.1) further to the decision reflected in paragraph 115 above were introduced by the Chairman of the Committee, who indicated that the Drafting Committee had devoted 17 meetings to the consideration of the articles referred to it under the terms reflected in paragraph 114 above and had adopted: for including in Part One, articles 1 (Scope and application of the present Code), 5 (Responsibility of States), 5 bis (Establishment of jurisdiction), 6 (Obligation to extradite or prosecute), 6 bis (Extradition of alleged offenders), 8 (Judicial guarantees), 9 (Non bis in idem), 10 (Non-retroactivity), 11 (Order of a Government or a superior), 12 (Responsibility of the superior), and 13 (Official position and responsibility); and, for inclusion in Part II, articles 15 (Aggression) and 19 (Genocide).

117. The Commission considered the report of the Chairman of the Drafting Committee at its 2409th and 2410th meetings. It noted that that report was of an interim character as some of the articles may call for review and should in any event be accompanied with commentaries. It accordingly decided to defer the final adoption of the above articles until after the completion of the remaining articles and to confine itself at the present session to taking note of the report of the Chairman of the Drafting Committee as reflected in the relevant summary record.